

WEST VIRGINIA  
WORKERS' COMPENSATION INDUSTRIAL COUNCIL

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Minutes of the meeting of the  
Workers' Compensation Industrial Council  
held on Wednesday, December 7, 2011,  
beginning at 1:02 PM

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December 7, 2011  
1:02 PM

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WV OFFICE OF THE INSURANCE COMMISSIONER  
1124 Smith Street, 4th Floor  
Charleston, West Virginia

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PENNY L. KERNS  
Certified Court Reporter  
and Notary Public

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INDUSTRIAL COUNCIL

Voting Members:

Bill Dean, Chairman

Dan Marshall

James H. Dissen

Edward Kent Hartsog, Vice-Chairman

Ex-Officio Members:

Michael D. Riley, Acting Commissioner  
WV Offices of the Insurance Commission

OIC Contacts:

Ryan Sims, Associate Counsel  
WV Offices of the Insurance Commission

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**P R O C E E D I N G S**

MR. DEAN: Okay. We'll go ahead and call the Industrial Council meeting to order. Let the minutes reflect Committeeman Dissen's here, Mr. Hartsog, Mr. Marshall and Mr. Dean.

The minutes were sent out of the previous meeting of October 27th. Everybody get a chance to look at them? Is there a motion to approve?

MR. DISSEN: So move.

MR. MARSHALL: Second.

MR. DEAN: Motion made and seconded to approve the minutes states of October 27th. Any comment on the motion?

(No response.)

MR. DEAN: All in favor, aye.

(Ayes responded.)

MR. DEAN: All opposed.

(No response.)

MR. DEAN: The ayes have it. We'll move on to Office of Judges report. Judge Drescher.

JUDGE DRESCHER: Thank you, Mr. Chairman. Judge Roush is out of town this week, so I'm giving the report in her absence. The report was forwarded to the Council members yesterday and there's also copies out here

1 on the table if anybody would like a copy of it.

2 I just want to touch on a few of the  
3 numbers and I'll be happy to, you know, respond to any  
4 questions you might have about what's in the report, but we  
5 acknowledged four hundred and nine protests for the month  
6 of November, bringing the total for the year 2011 to 4,668.  
7 This is essentially on par with what we did last year in  
8 terms of numbers. We also resolved three hundred and  
9 ninety issues in November and the total number of issues  
10 we've resolved for the calendar year 2011 is 4,676. So  
11 we've actually resolved eight more issues than we've  
12 acknowledged so far this year.

13 As of the end of November, we had 3,545  
14 issues pending at the Office of Judges, very consistent  
15 with where we've been the last three months, so we don't  
16 see any big change there. The only other number I really  
17 wanted to point out was that for the month of November we  
18 were able to issue approximately ninety-eight percent of  
19 our decisions within sixty days from the date of the submit  
20 order, so I feel pretty good about that number, given the  
21 loss of personnel we've been going through.

22 A couple of other things I wanted to  
23 mention. As many of you already know, Judge Copeland  
24 retired at the end of November and thankfully we have been

1 able to hire a new judge. We hired Scott Knuckles. Many  
2 of you know of his work here at the Legal Services Division  
3 of the Insurance Commissioner's Office. Scott started on  
4 November 16th, 2011. So he's just now starting to get his  
5 first decisions out and doing a great job so far. So we're  
6 pleased to have him on our staff.

7                   Also, the Fairmont office is closed. It was  
8 closed on November 1. We still continue to have hearings  
9 in the Fairmont area. Currently we're having those  
10 hearings at the Marion County Courthouse in the County  
11 Commission offices, and they've been very gracious to allow  
12 us to use those a couple of times a month. So far it's  
13 worked out very well.

14                   And lastly, I wanted to mention that we're  
15 continuing the work on our claims management software  
16 system, referred to as AIMS. It's our hope that we'll be  
17 able to actually switch over to our new software system  
18 sometime in January. Our IT people are telling us this  
19 will require some down time. We will not be able to  
20 process any work in the system while they're converting the  
21 information from the old system to the new system. We're  
22 doing all we can to minimize the length of that time. At  
23 this point I don't know exactly how long that's going to  
24 be. It's going to be several days. So we're still

1 negotiating with them on that actually. But looks like  
2 that's going to be done sometime in January, so we're  
3 looking forward to getting that over with, frankly.

4 That concludes my report. I'll be happy to  
5 address any questions Council may have.

6 MR. DEAN: Very good. Mr. Dissen, do  
7 you have any questions, sir?

8 MR. DISSEN: No, sir.

9 MR. DEAN: Mr. Hartsog?

10 MR. HARTSOG: No.

11 MR. DEAN: Mr. Marshall?

12 MR. MARSHALL: No, Mr. Chairman.

13 MR. DEAN: Thank you, sir.

14 JUDGE DRESCHER: Thank you.

15 MR. DEAN: We'll move on to request to  
16 file Title 85, Series 11. Ryan, do you want to handle  
17 that?

18 MR. SIMS: Members of the Industrial  
19 Council, good afternoon. We are bringing before you today  
20 a proposed Title 85 legislatively exempt rule. This is one  
21 of the first ones of these we've done in a while. It is a  
22 Title 85, Series 11. Of course, we're asking you for  
23 permission to file it with the Secretary of State for  
24 thirty days of public comment. You've seen sent a copy of

1 the proposed amended rule and as well a bullet summary of  
2 the proposed changes, so if you've been through that, you  
3 should have some feel for what we're doing here.

4           Essentially we're making several substantive  
5 changes, eliminating a few unnecessary provisions and also  
6 we always try to make any technical and styles to clean up  
7 that we notice that needs made. And my plan was just to go  
8 through the substantive areas that were affected under the  
9 rules, but you know the kind of -- you know, those are the  
10 ones that probably will be most relevant as we go through  
11 this process.

12           So if you want to either go with the rule or  
13 the bullet summary, either way would be fine, but I'm going  
14 to start in section two, and in that section we create  
15 definitions for -- there's actually a couple of new  
16 definitions, monthly based premium and also monthly based  
17 payroll. And those definitions were created pursuant to a  
18 provision much later in the rule where we address uninsured  
19 clients. So we felt we needed to create these definitions  
20 to sort of simplify the process for uninsured clients, and  
21 so I'll sort of explain that as we get to that provision.

22           Moving on to section four, this provision  
23 was amended to clarify that these postings that we do at  
24 non-compliant employers worksites don't -- you know, the



1 code just says chief works, which is sort of outdated  
2 language. It means I guess their central worksite, but we  
3 believe that we have enough statutory wiggle room, so to  
4 speak, to post it at any central place that that employer's  
5 been in business, such as if you have a non-compliant  
6 construction company, you might want to post it at a major  
7 project where they're operating illegally, that type of  
8 thing. So that's what we are trying to accomplish there.

9           Moving on to section eleven, this is --  
10 we're striking an entire section. It was a section that  
11 probably went on for about four or five pages in the rule  
12 discussing a remedy called distraint of personal property.  
13 And essentially what distraint is, it involves someone who  
14 is owed money using self-help, essentially, going and  
15 taking the property or possessing the property without  
16 going through the authorities. Through common law it was  
17 allowed for some time, but there are some West Virginia  
18 cases that indicate there are some problems with it. They  
19 deal with landlord tenant, but we felt in the Legal  
20 Division that there is enough questionability regarding  
21 this remedy that it would be appropriate to strike it from  
22 the rule.

23           Now, this doesn't really have any effect if  
24 some unique situation occurred where we really think, hey,

1 we need to use restraint here. Normally it's used when you  
2 think maybe, you know, in an employer setting where they  
3 might be fleeing with assets or something like that. Maybe  
4 we could try to use it. We'd have to carefully study the  
5 case law and there's a few code provisions on it, but we  
6 feel since it is not a process, to our knowledge, that has  
7 been used and probably won't be appropriately use, hasn't  
8 been used, by us or our predecessor agency for some time,  
9 that it would be best to strike the entire provision from  
10 the rule.

11 Now, we do leave a little blurb in the rule,  
12 I think, in section, I think it's section nine or ten  
13 maybe. I'm actually not finding it right here, but there's  
14 a little blurb somewhere in the rule noting that we still  
15 have the ability potentially to do it, but again, we're  
16 striking the longer provision over those concerns.

17 Moving on to -- and that was the original  
18 section eleven that we're striking, so that resets the  
19 numbering on the rest of the rule. And moving on to  
20 section eleven, this section discusses the ability of a  
21 default employer to enter into a payment agreement with the  
22 Insurance Commission, and we amended that section to  
23 provide the Commission some more flexibility with regard to  
24 deciding how much of a down payment to require, if any,

1 and, you know, time periods for the payment agreement and  
2 that type of thing. We felt it was too restrictive, sort  
3 of boxing us into situations where, you know, you want to  
4 give more leniency to employers who appear to have a better  
5 ability to pay, for example. You want to give more  
6 leniency or maybe a longer period to an employer who isn't  
7 a repeat offender, just to cite some examples.

8               So we felt that providing more leniency  
9 along those lines sort of set some standards but provided  
10 an ability to deviate from them in the appropriate  
11 situation would be the way to go. So that's how we amended  
12 the new section eleven.

13               Section seventeen, this section discusses  
14 the due process of an employer who is initially proceeded  
15 against for being in default, you know, an employer we  
16 discover is in default. The old provision of the rule  
17 provided that a hearing, what we call a Rule 11 hearing,  
18 and that's their due process to, you know, where they have  
19 a chance to say, hey, don't place us on the default list,  
20 there's a mistake being made here. Originally that just  
21 had to be scheduled within ten days and then it could on  
22 for a while. We are amending this to essentially say that  
23 it has to be held within ten days, although the hearing  
24 examiner will have discretion for good cause to grant a

1 continuance to an employer. And the policy goal here is to  
2 prevent an employer from delaying being placed on the  
3 default list. You know, just by bringing things up, things  
4 like that, you know, because if it only needs to get  
5 scheduled within ten days, it could get scheduled a month,  
6 six weeks down the road. So that's why we made that  
7 change.

8                   And then finally section nineteen, that ties  
9 into those definitions I discussed at the beginning. The  
10 language regarding uninsured clients, an uninsured employer  
11 can be fined a maximum of ten thousand dollars once we  
12 discover them to be uninsured or have been uninsured in the  
13 past. And the past language made some differentiations  
14 between employers whose policies defaulted versus employers  
15 who never had coverage in the first place, and it caused  
16 some confusion and it particularly cause -- we actually had  
17 a case that was litigated and they were making some  
18 arguments based on the current language. So what we did  
19 is, we simplified it, and essentially what it says now, we  
20 believe is it doesn't matter if they had insurance or never  
21 had it. For any period where you're uninsured, you face  
22 essentially a fine twice the amount of monthly premium you  
23 would have paid up to ten thousand dollars, and it doesn't  
24 matter, again, if they had insurance and let it lapse or we

1 discovered they didn't have insurance for six months, you  
2 know, under the state and started doing business, that type  
3 of thing, and then it still caps at ten thousand bucks.  
4 But essentially what this does is it very much simplifies  
5 the verbiage in the bond process just to make it sort of a  
6 streamlined process.

7 So with that, I will be glad to take any  
8 questions.

9 MR. DEAN: Mr. Disen?

10 MR. DISSEN: I don't have any questions  
11 about this. I'm just looking for information. What  
12 happens -- I know the protection, but what if an employer  
13 files bankruptcy? Does that just take it, then, away from  
14 this, you're just in bankruptcy court and whatever it is,  
15 it is?

16 MR. SIMS: Well, actually there's  
17 language in there in Rule 11 that addresses that. I'm  
18 trying to see which section it is.

19 MR. DISSEN: The section you delete?

20 MR. SIMS: No, it wasn't the section we  
21 deleted. Section ten discusses that the Commissioner can  
22 enter a bankruptcy proceeding and essentially get in line  
23 with other creditors. Now, there's some debate with regard  
24 to the biggest type of debt a current uninsured employer

1 would accrue, which would be an uninsured fund debt.  
2 There's some debate as to where we stand in line with other  
3 creditors, and we're doing some pretty deep research on  
4 that right now. We haven't, fortunately, had a major  
5 bankruptcy in the uninsured fund case where there was major  
6 assets, so that's something that we're taking a careful  
7 look at. There may be an argument that we can jump ahead  
8 of some creditors. We're just not sure yet, so we're  
9 taking a look at that.

10 MR. DISSEN: Okay.

11 MR. SIMS: But the quick answer is yes,  
12 we can get involved in a bankruptcy proceeding.

13 MR. DEAN: Mr. Hartsog?

14 MR. HARTSOG: None.

15 MR. DEAN: Are you sure?

16 MR. HARTSOG: Sorry to disappoint you.

17 MR. DEAN: Mr. Marshall?

18 MR. MARSHALL: No, Mr. Chairman.

19 MR. DEAN: Very good, Ryan. So is there  
20 a motion to approve filing of Title 85, Series 11 for a  
21 thirty-day public comment?

22 MR. HARTSOG: So move.

23 MR. MARSHALL: Second.

24 MR. DEAN: Motion made and seconded to

1 approve it. Any question on the motion?

2 (No response.)

3 MR. DEAN: All in favor, aye.

4 (Ayes responded.)

5 MR. DEAN: All opposed.

6 (No response.)

7 MR. DEAN: The ayes have it. See, Ryan,  
8 you done well. We'll move on to general public comments.  
9 Anybody from the general public have comments to make  
10 today? Henry, you were late. You were studying something.  
11 What have you got to say?

12 MR. BOWEN: I have no comments. Thank  
13 you, sir.

14 MR. DEAN: Thank you, sir. We'll move  
15 on to old business. Anybody on the Industrial Council have  
16 anything under old business? Mr. Dissen?

17 MR. DISSEN: No, sir.

18 MR. DEAN: Mr. Hartsog?

19 MR. HARTSOG: No, sir.

20 MR. DEAN: Mr. Marshall?

21 MR. MARSHALL: No.

22 MR. DEAN: Moving on. New business?  
23 Mr. Dissen, do you have anything to bring up under new  
24 business?

1 MR. DISSEN: No, Mr. Chairman.

2 MR. DEAN: Mr. Hartsog?

3 MR. HARTSOG: No.

4 MR. DEAN: Mr. Marshall?

5 MR. MARSHALL: No, Mr. Chairman.

6 MR. DEAN: Okay. We're moving right  
7 along. The next meeting will be Thursday, January 12th,  
8 2012, at 1:00 PM. We'd like to move that to January the  
9 11th at 2:00 PM. Commissioner, did you have a comment  
10 you'd like to make?

11 COMMISSIONER RILEY: I think we do have some  
12 new business to take care of.

13 MR. DEAN: Okay.

14 COMMISSIONER RILEY: Ms. Shepherd is here to  
15 present.

16 MR. DEAN: Back to the next meeting and  
17 I'll come right back to new business, but are you okay with  
18 the next meeting being January the 11th at 2:00?

19 COMMISSIONER RILEY: Yes, sir.

20 MR. DEAN: Very good. Okay. Ms.  
21 Shepherd.

22 MS. SHEPHERD: Mr. Hartsog had sent us some  
23 questions on the county risk pools, which to kind of  
24 clarify that, because we have risk pools guaranteeing a



1 security pool, you have to think of the county risk pool as  
2 more of a group than a pool. So there, the county risk  
3 pool self-insured status is regulated through a combination  
4 of chapters twenty-three and thirty-three, so that makes it  
5 a little different from the rest of our self-insureds. In  
6 addition to the related legislative rules, which are most  
7 significantly Title 85, Series 18 and Title 114, Series 65,  
8 because the statutory basis is in chapter thirty-three,  
9 there are a few differences in the regulation of the county  
10 risk pool.

11                   The most significant ones are the Industrial  
12 Council doesn't have direct involvement with or  
13 responsibility for regulating these types of self-insureds  
14 and the political subdivision pools do not participate in  
15 the security and guarantee risk pool. The risk pool  
16 consists of forty members currently, and I've provided you  
17 a list of all of the names of them. Most of them are  
18 county commissions, but there's also a solid waste  
19 authority, an ambulance authority, public service district,  
20 planning and development council, and a county health  
21 department.

22                   We get updated lists from the administrator  
23 on a quarterly basis of any new members. The  
24 administration of this pool is handled by Public Risk

1 Services out of Roanoke, Virginia, and they also provide  
2 the claim management services.

3 The county risk pool does participate in our  
4 quarterly assessments, the debt reduction and the  
5 regulatory surcharge, and they're subject to the same  
6 regulation as the other self-insureds, except for the  
7 exceptions previously noted. We will perform the same type  
8 of annual review that we perform on our other self-  
9 insureds: the claim date of reporting; the AVI; their  
10 financial condition; whether they're paying their quarterly  
11 assessments timely; and a check of their security.

12 They currently are fully secured and will  
13 also be subject to market conduct reviews. We don't have  
14 any other applications from political subdivisions at this  
15 time. I'm not aware of any additional interest. Does that  
16 pretty well answer your question?

17 MR. DEAN: Mr. Dissen, do you have any  
18 questions, sir?

19 MR. DISSEN: No, I do not.

20 MR. DEAN: Mr. Hartsog?

21 MR. HARTSOG: No. I think that kind of  
22 covered it. I was just curious what the status was and  
23 whether we were fielding on that or not. On the list here  
24 you list the West Virginia Association of Counties, which

1 says it's a legislative lobbying organization for counties.  
2 How does that qualify as being part of that? I wouldn't  
3 think that would be a government organization.

4 MS SHEPHERD: We don't actually regulate  
5 the members of the pool, because the pool has certain  
6 requirements for their membership, and their board approves  
7 the new members, any request for new membership.

8 COMMISSIONER RILEY: We certainly would look  
9 to see to make sure that everybody qualifies under the  
10 statute.

11 MR. HARTSOG: That just kind of raises a  
12 question about, well, what if XYZ Manufacturing Company  
13 wanted to be a member of that pool --

14 COMMISSIONER RILEY: There's certain  
15 criteria. And you point out one, we'll take a look at it.

16 MR. HARTSOG: Thank you.

17 MR. DEAN: Mr. Marshall, do you have any  
18 questions?

19 MR. MARSHALL: No, Mr. Chairman.

20 MR. DEAN: Very well. Mr. Commissioner,  
21 do you have anything else under new business we'd like to  
22 talk about?

23 COMMISSIONER RILEY: No, I don't believe so.

24 MR. HARTSOG: Well, I did ask

1 something about I'd like to follow up on the old fund  
2 administrative, especially with some detail on the  
3 administrative costs, if that's appropriate.

4 MS. SHEPHERD: I'll be happy to do that.

5 COMMISSIONER RILEY: We'll make sure you get  
6 something next week or next meeting.

7 MR. HARTSOG: Yeah, it was just on the  
8 email, so that's the reason I asked about it. Next time is  
9 great. Thank you.

10 MR. DEAN: Anything else under new  
11 business?

12 (No response.)

13 MR. DEAN: Okay, we'll move on. The  
14 next meeting, as I say, will be changed to January the 11th  
15 at 2:00 PM. That's suits everybody. Next order of  
16 business is executive session.

17 The next item on the agenda is related to  
18 self-insured employers. These matters involve discussion  
19 of specific confidential information regarding the self-  
20 insured employer that would be exempt from disclosure under  
21 the West Virginia Freedom of Information Act pursuant to  
22 West Virginia Code 23-1-4(b); therefore, it is appropriate  
23 that the discussion take place in executive session under  
24 the provisions of the West Virginia Code 6-9A-4. If there

1 are any actions taken with regard to any specific matters  
2 for an employer, this will be done upon reconvening of the  
3 public session. Is there a motion to go into executive  
4 session?

5 MR. MARSHALL: So moved.

6 MR. DISSEN: Second.

7 MR. DEAN: Motion made and seconded.

8 Question on the motion? All in favor, aye.

9 (Ayes responded.)

10 MR. DEAN: All opposed?

11 (No response.)

12 MR. DEAN: The ayes have it.

13

14 (Executive session began at 1:27 and ended at 1:35 PM.)

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1                   MR. DEAN:        Okay. We'll go back into  
2 regular session. We have two resolutions to discuss here,  
3 to vote on whether to approve or not. The first one we'll  
4 do is the eighteen companies on Exhibit A that are  
5 recommended for renewal for self-insured status. Is there  
6 a motion to approve that?

7                   MR. MARSHALL:   So made, Mr. Chairman.

8                   MR. HARTSOG:    Second.

9                   MR. DEAN:        Motion made and seconded.  
10 Any questions on the motion?

11                                    (No response.)

12                   MR. DEAN:        All in favor, aye.

13                                    (Ayes responded.)

14                   MR. DEAN:        All opposed.

15                                    (No response.)

16                   MR. DEAN:        The ayes have it. The second  
17 resolution is the four companies. Mr. Hartsog, would you  
18 like to recuse yourself from that?

19                   MR. HARTSOG:    Yes, I am recusing myself  
20 from voting on that.

21                   MR. DEAN:        Okay. Very good. The second  
22 resolution is for, to approve the self-insured status for  
23 the recommended four companies. Is there a motion?

24                   MR. MARSHALL:   So made, Mr. Chairman.

1 MR. DISSEN: Second.

2 MR. DEAN: Motion made and seconded to  
3 approve the self-insured status of the four companies. Any  
4 questions on the motion?

5 (No response.)

6 MR. DEAN: All in favor, aye.

7 (Ayes responded.)

8 MR. DEAN: All opposed.

9 (No response.)

10 MR. DEAN: The ayes have it. Anything  
11 else that needs to be discussed under regular session?

12 (No response.)

13 MR. DEAN: Motion for adjournment?

14 MR. DISSEN: So moved.

15 MR. MARSHALL: Second.

16 MR. DEAN: We're adjourned.

17

18 (WHEREUPON, the hearing was

19 adjourned at 1:36 PM.)

20

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,  
COUNTY OF PUTNAM, To-wit:

I, Penny L. Kerns, Certified Court Reporter,  
do hereby certify that the foregoing is a correct verbatim  
record of the proceedings had and testimony taken at the  
time and place set forth herein.

Given under my hand this 21st day of  
December, 2011.

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Penny L. Kerns, CCR  
Notary Public

My commission expires May 13, 2018.